JH

KC FILED
SEP 19 2007
SEP 19, 2007
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

MARC S. KIRSCHNER, As Trustee of the Refco Litigation Trust,

Plaintiff,

-vs.-

GRANT THORNTON LLP, MAYER BROWN, ROWE & MAW, LLP, ERNST & YOUNG U.S. LLP, PRICEWATERHOUSECOOPERS LLP, CREDIT SUISSE SECURITIES (USA) LLC (f/k/a CREDIT SUISSE FIRST BOSTON LLC), BANC OF AMERICA SECURITIES LLC, DEUTSCHE BANK SECURITIES INC., PHILLIP R. BENNETT, SANTO C. MAGGIO, ROBERT C. TROSTEN, TONE N. GRANT, REFCO GROUP HOLDINGS, INC., LIBERTY CORNER CAPITAL STRATEGIES, LLC, WILLIAM T. PIGOTT, EMF FINANCIAL PRODUCTS, LLC, EMF CORE FUND, LTD., DELTA FLYER FUND, LLC, ERIC M. FLANAGAN, INGRAM MICRO, INC., CIM VENTURES, INC., BECKENHAM TRADING CO., INC., ANDREW KRIEGER, COAST ASSET MANAGEMENT, LLC (f/k/a COAST ASSET MANAGEMENT LP), CS LAND MANAGEMENT, LLC, and CHRISTOPHER PETITT,

Defendants.

No. 07 Civ.

NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. § 1452

07CV5306
JUDGE HOLDERMAN
MAGISTRATE JUDGE VALDEZ

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that, on this date, Credit Suisse Securities (USA) LLC (formerly Credit Suisse First Boston LLC), Banc of America Securities LLC, Deutsche Bank Securities Inc., Grant Thornton LLP ("Grant Thornton"), Mayer Brown LLP ("Mayer

Brown"), Mayer Brown International LLP ("Mayer Brown UK"),[1] and PricewaterhouseCoopers LLP (collectively, the "Removing Defendants"), by their undersigned counsel, file this Notice of Removal pursuant to 28 U.S.C. § 1452 removing this matter from the Circuit Court of Cook County, Illinois, County Department, Law Division (the "Illinois State Court"), to the United States District Court for the Northern District of Illinois. This Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1334.

In support of this Notice of Removal, the Removing Defendants state as follows:

THE COMPLAINT

1. On or about August 21, 2007, Plaintiff Marc S. Kirschner (the "Trustee"), in his capacity as the Trustee for the Refco Litigation Trust (the "Trust") created under the bankruptcy plan of liquidation for Refco Inc. ("Refco") and certain of its affiliates, commenced a civil action by filing a summons and complaint in the Illinois State Court, captioned *Kirschner v. Grant Thornton, et al.*, Case No. 07 L 8818 (the "Complaint"). The Trustee seeks in excess of $2 billion dollars in alleged damages, pre- and post-judgment interest, attorneys fees and costs. The Complaint asserts forty-four causes of action against one or more of the defendants including multiple claims for (a) Breach of Fiduciary Duty; (b) Fraud; (c) Malpractice; (d) Negligent Misrepresentation; (e) Aiding and Abetting Breach of Fiduciary Duty; and (f) Aiding and Abetting Fraud. A copy of the Complaint is attached

[1] The defendant alleged in the Complaint to be "Mayer, Brown, Rowe & Maw LLP" is actually two limited liability partnerships both formerly named "Mayer, Brown, Rowe & Maw LLP" – one established in Illinois and the other incorporated in England and Wales. Effective September 1, 2007, the two entities were renamed. "Mayer Brown LLP" is the new name of the Illinois limited liability partnership, and "Mayer Brown International LLP" is the new name of the UK limited liability partnership.

to the Declaration of John V.H. Pierce, dated September 19, 2007, filed herewith, as Exhibit A.

2. According to the Complaint, the Trustee has brought the claims asserted therein on behalf of Refco, Refco Group Ltd., LLC ("RGL"), and Refco Capital Markets, Ltd. ("RCM") and for the benefit of those entities' creditors. Refco, RGL and RCM, as well as other corporate affiliates (collectively, with Refco, RGL and RCM, the "Refco Debtors"), are currently in Chapter 11 bankruptcy proceedings (Case No. 05-60006 (RDD)) ("the Bankruptcy Proceedings") pending in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). While the Bankruptcy Court recently confirmed a plan of liquidation for the Refco Debtors, their bankruptcy cases remain active.

GROUNDS FOR REMOVAL

3. Under 28 U.S.C. § 1452(a), "[a] party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under § 1334 of this title." Under 28 U.S.C. § 1334(b), this Court has jurisdiction to hear all civil proceedings that are "related to cases under title 11," which is the Bankruptcy Code.

4. A case is "related to" a bankruptcy proceeding "when the dispute affects the amount of property for distribution (*i.e.*, the debtor's estate) or the allocation of property among creditors." *In re Fedpak Sys., Inc.*, 80 F.3d 207, 213-14 (7th Cir. 1996) (*citing In re Memorial Estates, Inc.*, 950 F.2d 1364, 1368 (7th Cir. 1992) (internal quotations omitted)). "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on

the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).

5. The Trustee's claims are related – indeed, have a substantial nexus – to the ongoing Bankruptcy Proceedings in several ways, including:

(a) The Plan confirmed by the Bankruptcy Court provides for the appointment of the Trustee, creates the Trust, and provides for the Refco Debtors' bankruptcy estates to continue post-confirmation. The Plan designates the Trustee a "representative of the [bankruptcy] [e]states" of the Refco Debtors to pursue litigation, such as this action, following the Plan's confirmation, for the benefit of the estates' creditors. *See, e.g.*, Plan, Art. V, § 5.7 ("Upon transfer of the Contributed Claims to the Litigation Trust, . . the Litigation Trustee shall be a representative of the Estates pursuant to section 1123(a)(5), (a)(7) and (b)(3)(B) of the Bankruptcy Code with respect to Contributed Claims."). Indeed, the Plan provides for the Bankruptcy Court to retain jurisdiction – as arising out of or related to the Bankruptcy Proceedings – of causes of action pursued post-confirmation by the Litigation Trustee. *See, e.g.*, Plan, Art. XI, § 11.1K (" Pursuant to sections 105(c) and 1142 of the Bankruptcy Code and notwithstanding entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court shall retain exclusive jurisdiction . . . over all matters arising out of, and related to, the Chapter 11 Cases . . . to the fullest extent permitted by law, including . . . jurisdiction to . . . (k) [h]ear and determine causes of action on behalf of the . . . Litigation Trustee . . ."). Thus, this action necessarily affects the Refco Debtors' bankruptcy estates and involves the implementation and execution of the Plan.

(b) The Trustee is seeking billions of dollars in damages for the benefit of the Refco Debtors' creditors. It is well established that an action like this, brought on behalf of a bankruptcy estate, generally satisfies the test for bankruptcy, "related to" jurisdiction. *See, e.g., Diamond Mortg. Corp. of Ill. v. Sugar*, 913 F.2d 1233, 1239 (7th Cir. 1990) (holding that debtors' state law claims against former professionals for malpractice were "related to" the debtors' bankruptcy estate because the suit could impact the asset pool available for distribution to creditors). This rule of law continues to apply after confirmation of a plan of where, as here, the plan provides for the debtor's liquidation, the continuation of the debtor's bankruptcy estate, and the distribution of any recoveries for the benefit of the debtor's creditors. *See, e.g., Boston Reg'l Med. Ctr. v. Reynolds (In re Boston Reg'l Med. Ctr., Inc.)*, 410 F.3d 100, 107 (1st Cir. 2005) (where "a debtor (or a trustee acting to the debtor's behalf) commences litigation designed to marshal the debtor's assets for the benefit of its creditors pursuant to a liquidating plan of reorganization, the compass of related to jurisdiction persists undiminished after plan confirmation"); *In re Linc Capital, Inc.*, 310 B.R. 847, 855-56 (Bankr. N.D. Ill. 2004) ("related to" jurisdiction existed over state law claims brought post-confirmation by estate representative created under confirmed plan to pursue claims on behalf of the debtor's creditors); *In re S.N.A. Nut Co.*, 206 B.R. 495, 500-01 (Bankr. N.D. Ill. 1997) ("Bankruptcy Court jurisdiction over post-confirmation matters is appropriate when adjudication has an impact on the estate or the recovery of the creditors. . . . If Debtor is successful in this action, net litigation proceeds will go to the unsecured creditors. The substantial impact the resolution may have on the asset pool available for distribution to creditors makes 'related to' jurisdiction appropriate.").

(c) Certain of the defendants in this action have filed proofs of claim against the Refco Debtors in the Bankruptcy Proceedings. Defendant Grant Thornton, for example, has asserted claims for contribution and for unpaid fees, among other things. Those claims and the related objections have been adjourned without date so that the issues underlying them may be litigated in the context of lawsuits by representatives of the Refco Debtors' estates and others. Thus, the outcome of this litigation may have a direct impact on whether these claims are ultimately allowed and how much is distributed on these claims from the bankruptcy estates. That in turn will impact the amount of property available for distribution to other creditors. Indeed, some of the claims filed in the Bankruptcy Proceeding by the defendants here may be asserted as counterclaims in this action itself.

(d) Three of the defendants in this action, all former executives of Refco, have commenced an adversary proceeding in the Bankruptcy Court to obtain access to Refco Debtors' directors and officers' liability insurance, or other insurance that may be property of the Refco Debtors' bankruptcy estates, in order to defend against the Trustee's claims in this and other actions. The former executives invoke bankruptcy jurisdiction under 28 U.S.C. § 1334.

6. Accordingly, this action is "related to" the Bankruptcy Proceedings, and removal is proper under 28 U.S.C. § 1452(a).

TIMELINESS

7. The Removing Defendants have timely filed this notice of removal within 30 days of service of the Complaint in accordance with 28 U.S.C. § 1446(b) and Fed. R. Bankr. P. 9027(a)(3). The Removing Defendants were served with a summons and the Complaint in this action no earlier than August 21, 2007.

8. The Removing Defendants have served a copy of this Notice on counsel for Plaintiff and will file a copy of this Notice with the Clerk of the Illinois State Court in accordance with the terms of 28 U.S.C. § 1446(d) and Fed. R. Bankr. P. 9027(b). A true and correct copy of the Certificate of Service for this Notice of Removal is attached to the Declaration of John V.H. Pierce as Exhibit B.

NON-CORE

9. As required under Fed. R. Bankr. P. 9027(a)(1), the Removing Defendants state that the claims asserted against them are non-core, within the meaning of 28 U.S.C. § 157(b), and that they do not consent to entry of final orders or judgment by the bankruptcy judge. To the extent necessary, the Removing Defendants intend to file a motion to withdraw the reference of this action from bankruptcy to district court.

RELATED CASES

10. In addition to the Bankruptcy Proceedings, the instant action is related to nine civil actions currently pending before the Honorable Gerard E. Lynch in the United States District Court for the Southern District of New York:

(a) the consolidated securities class action, *In re Refco, Inc. Securities Litigation*, 05 Civ. 8626 (S.D.N.Y. 2005) (consolidating 19 separate and independently filed actions);

(b) the consolidated customer class action, *In re Refco Capital Markets, Ltd. Brokerage Customer Securities Litigation*, 06 Civ. 643 (S.D.N.Y. 2006) (consolidating two separate and independently filed actions);

(c) *American Financial International Group-Asia, L.L.C. v. Refco, Inc., et al.*, 05 Civ. 8988 (S.D.N.Y. 2005);

(d) *Carmona v. Paulson, et al.*, 05 Civ. 9327 (S.D.N.Y. 2005);

(e) *Thomas H. Lee Equity Fund V, L.P., et al. v. Bennett, et al.*, 05 Civ. 9608 (S.D.N.Y. 2005);

(f) *Kirschner v. Thomas H. Lee Partners, L.P., et al.*, 07 Civ. 7074 (S.D.N.Y. 2007);

(g) *Thomas H. Lee Equity Fund V, L.P., et al. v. Mayer, Brown, Rowe & Maw L.L.P.*, 07 Civ. 6767 (S.D.N.Y. 2007);

(h) *Axis Reinsurance Co. v. Bennett, et al.*, 07 Civ. 7924 (S.D.N.Y. Sept. 10, 2007); and

(i) *Kirschner v. Phillip R. Bennett, et al.*, 07 Civ. 8165 (S.D.N.Y. Sept. 18, 2007).

11. The instant action is also related to a civil action currently pending in New York State Supreme Court, *Thomas H. Lee Equity Fund V, LP, et al. v. Grant Thornton LLP*, 602774/2007 (N.Y. Sup. Ct. Aug. 16, 2007).

12. In light of the substantial body of related litigation pending in the Southern District of New York, the Removing Defendants intend to file a motion before the Judicial Panel on Multidistrict Litigation (the "MDL Panel") pursuant to 28 U.S.C. § 1407 to transfer this case to that district for coordination of pretrial proceedings with the related civil cases referenced in Paragraph 10 above.

WHEREFORE, the Removing Defendants respectfully request that this Court accept this Notice of Removal and grant them such other and further relief as the Court deems just and proper.

Dated: Chicago, Illinois
September 19, 2007

REED SMITH, LLP

By: /s/ Pia Thompson

Jeffrey T. Gilbert (ARDC #3128514)
Pia N. Thompson (ARDC #6225746)

10 South Wacker Drive, 40th Floor
Chicago, Illinois 60606-7507
Tel.: (312) 207-1000
Fax: (312) 207-6400

- and –

WILMER CUTLER PICKERING
HALE AND DORR LLP

Robert B. McCaw
Philip D. Anker
Lori A. Martin
John V.H. Pierce
Dawn M. Wilson
Michael L. Feinberg
Ross E. Firsenbaum

399 Park Avenue
New York, New York 10022
Tel.: (212) 230-8800
Fax: (212) 230-8888

Counsel to Defendants Credit Suisse Securities (USA) LLC (formerly Credit Suisse First Boston LC), Banc of America Securities LLC, and Deutsche Bank Securities Inc.

Dated: Chicago, Illinois
September 19, 2007

WINSTON & STRAWN LLP

By: Linda Coberly

Bradley E. Lerman
Linda T. Coberly
Catherine W. Joyce

35 West Wacker Drive
Chicago, Illinois 60601
Tel.: (312)-558-5600
Fax: (312)-558-5700

- and –

David E. Mollón

200 Park Avenue
New York, New York 10166-4193
Tel.: (212)-294-6700
Fax: (212)-294-4700

Attorneys for Defendant
Grant Thornton LLP

Dated: Chicago, Illinois
September 19, 2007

KEVIN M. FORDE, LTD.

By: ______________________
Kevin M. Forde

111 West Washington Street
Suite 1100
Chicago, Illinois 60602
Tel: (312) 641-1441
Fax: (312) 641-1288

- and -

WILLIAMS & CONNOLLY LLP
John K. Villa
Michael S. Sundermeyer
Craig D. Singer
Thomas G. Ward

725 Twelfth Street, N.W.
Washington, D.C. 20005
Tel.: (202) 434-5000
Fax: (202) 434-5029

Attorneys for Defendant Mayer Brown LLP

Dated: New York, New York
September 19, 2007

CLIFFORD CHANCE US LLP

By: Anthony M Candido w/ perm.

Anthony M. Candido
Joel M. Cohen

31 West 52nd Street
New York, New York
Tel.: (212)-878-8000
Fax: (212)-878-8375

Attorneys for Defendant
Mayer Brown International LLP

Dated: New York, New York
September 19, 2007

Respectfully submitted,

ORRICK HERRINGTON & SUTCLIFFE LLP

James P. Cusick (ARDC 6185265)

666 Fifth Avenue
New York, New York 10103
Tel.: (212) 506-5000
Fax: (212) 506-5151

-and-

KIRKLAND & ELLIS LLP

Emily Nicklin (ARDC 2050560)

200 East Randolph Drive
Chicago, Illinois 60601
Tel.: (312) 861-2000
Fax: (312) 861-2200

Attorneys for Defendant
PricewaterhouseCoopers LLP